Supreme Court, U.S.
FILED
DEC 22 1993
OFFICE OF THE CLERK

No. 93-635 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR J. GERBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm, requires that the underlying state law violated be a law expressly addressed to the protection of archaeological resources.

2. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979 applies to archaeological resources removed from private property without the owner's permission.

3. Whether Section 470ee(c) of the Archaeological Resources Protection Act of 1979 is unconstitutionally vague.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Ardestani v. *INS*, 112 S. Ct. 515 (1991)	7
Bifulco v. *United States*, 447 U.S. 381 (1980)	10-11
Crandon v. *United States*, 494 U.S. 152 (1990)	8
Deal v. *United States*, 113 S. Ct. 1993 (1993)	10
Freytag v. *C.I.R.*, 111 S. Ct. 2631 (1991)	10
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	8
Moskal v. *United States*, 498 U.S. 103 (1990)	7
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985)	7, 8
United States v. *Austin*, 902 F.2d 743 (9th Cir.), 498 U.S. 874 (1990)	11
United States v. *Naftalin*, 441 U.S. 768 (1979)	10
Village of Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)	12

Statutes and rule:

Act of Nov. 3, 1988, Pub. L. No. 100-588, § 1(c), 102 Stat. 2983	5
Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm	4
16 U.S.C. 470bb(3)	9
16 U.S.C. 470bb(4)	9
16 U.S.C. 470ee(a)	10, 11
16 U.S.C. 470ee(b)	10
16 U.S.C. 470ee(c)	2, 4-5, 6, 7, 8, 9, 10, 11
16 U.S.C. 470ee(d)	2, 4-5

Statutes—Continued:

Page

18 U.S.C. 371 5
Indiana Code (1992):
§ 8-23-9-52 3
§ 35-43-2-2(4) 5
§ 35-43-4-3 5

Miscellaneous:

Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work*, Cultural Resources Report No. 32 (USDA Forest Service, Southwestern Region) (July 1980) 8, 11
125 Cong. Rec. 21,241 (1979) 7
Cultural Resources Law Enforcement: An Emerging Science (USDA Forest Service, Southwestern Region) (1980) 11

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 999 F.2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1993, and corrected on July 22, 1993. Pet. App. 1a-10a. The petition for a writ of certiorari was filed on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the Southern District of Indiana to five misdemeanor counts of interstate

transportation of archaeological resources, in violation of 16 U.S.C. 470ee(c) and (d). He was sentenced to 12 months' imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. In 1985, the General Electric Company (GE) purchased a piece of untillable land, which included a prominent knob on top of a ridge, next to its southwestern Indiana factory. Unbeknownst to anyone at the time, this knob was actually an ancient burial mound affiliated with the "Hopewell phenomenon." The "Hopewell phenomenon" represents an Indian culture that existed in the American midwest more than fifteen hundred years ago and that included the beginnings of settled agriculture, elaborate ceremonialism, and extensive and far-flung trading networks. Between 100 and 300 A.D., these Indians built a series of large earthen mounds over prepared mound floors that contained human remains and thousands of ceremonial artifacts and grave goods made of silver, copper, wood, cloth, leather, obsidian, flint, mica, quartz, pearl, shell, and drilled, carved, or inlaid human and bear teeth. The "GE Mound" in southwestern Indiana is one of the five largest Hopewell burial mounds known.[1] Until its discovery in May 1988, its contents—including two human skeletons, and perishable wood and leather artifacts—remained intact and well preserved. Pet. App. 2a-3a; Gov't C.A. Br. 4-6.

2. In 1987 and 1988, the Indiana Department of Highways oversaw the construction of a new road through the ridge near the GE Mound. The workmen were unable to

[1] The GE Mound was approximately 400 feet long, 175 feet wide, and 20 feet high. Construction of the mound required the Indians to haul an estimated 289,000 bushel basketloads of earth from the river to the ridge. Pet. App. 3a; Gov't C.A. Br. 4-5.

stabilize the roadbed, however, and thus in May 1988, they began to remove earth from the knob in order to stabilize the slopes and roadbed.[2] Two workmen scraping the earth soon discovered a large number of turtleback-shaped rocks packed together in the knob. They showed the rocks to Bill Way, a heavy-equipment operator on the project who had long collected Indian artifacts and recognized the significance of the rocks. Pet. App. 3a; Gov't C.A. Br. 6-9.

On June 3, 1988, Way used his bulldozer to fill in the pit left by the removal of earth and discovered hundreds of artifacts, including flint spearpoints, drilled and inlaid bear teeth, solid copper axeheads, and tooled leather. Way took the artifacts to his home in Illinois that night and returned for more artifacts the next day, after which he covered up the excavation site. Neither Way, his foreman, nor the other workmen notified the project engineer or anyone else about the archaeological discovery, as they were required to do. Pet. App. 3a; Gov't C.A. Br. 9-10.

In mid-July 1988, a fellow construction worker put Way in touch with petitioner, a well-known collector of Indian artifacts and promoter of annual Indian "relic-

[2] The workmen began the dirt "borrowing" operation only after the contractor had obtained an archaeological survey and clearance of the area, as required by federal and state highway regulations (the road was funded in part by the federal government). The survey did not locate any archaeological sites, but noted that if any archaeological materials were found during the "borrow" operation, the Indiana Division of Historic Preservation and Archaeology should be notified immediately. The Indiana Department of Highways manual, applicable to all state-administered highway contracts, also required contractors to bring in an archaeologist if artifacts were discovered during borrow operations. Gov't C.A. Br. 6-7; see Indiana Code § 8-23-9-52 (1992).

shows." Petitioner recognized Way's collection as Hopewell material, and he offered Way $6,000 for the artifacts. On July 21, 1988, petitioner met Way at Way's home in Illinois, where he paid Way $6,000 in cash for the artifacts and for revealing to petitioner the location of the GE Mound. That evening, Way took petitioner to the site in Indiana, where they encountered other people digging for artifacts. Petitioner returned to the mound site with two co-defendants four times over the next eight days, excavating and removing hundreds of artifacts, including copper axe-heads, silver earspools, and rare silver "panpipe" musical instruments. A GE security guard caught petitioner and ejected him from the site on his last visit. Pet. App. 3a; Gov't C.A. Br. 10-14.

Petitioner sold some of his artifacts at his annual "Indian Relic Show of Shows" in Owensboro, Kentucky, in early August 1988. In the spring of 1989, petitioner traveled to the Kentucky home of one of his co-defendants, where he paid $2,000 in cash for some of the artifacts the co-defendant had recovered from the GE Mound. Pet. App. 3a; Gov't C.A. Br. 14.

3. Petitioner was indicted on five misdemeanor counts and one felony count charging him with interstate transportation of archaeological resources, in violation of Sections 470ee(c) and (d) of the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm (ARPA),[3] and one count of conspiring to violate 16 U.S.C.

[3] Section 470ee(c) of Title 16 provides:

> No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law.

470ee(c) and (d), in violation of 18 U.S.C. 371. Petitioner moved to dismiss the indictment for failure to state an offense, arguing that the ARPA did not apply to his conduct and that the ARPA is void for vagueness. The district court denied the motion. See Pet. App. 13a-17a.

Several months later, petitioner entered a conditional guilty plea to five misdemeanor counts of violating the ARPA, reserving for appellate review the issues raised in his motion to dismiss. In return for his pleas, the government agreed to dismiss the two felony counts of the indictment. At his plea hearing, petitioner admitted that he had entered GE's land and removed Indian artifacts buried in the GE Mound without GE's permission. He also acknowledged that in so doing, he had committed criminal trespass and conversion in violation of Indiana law.[4] He further acknowledged that he had knowingly transported some of the stolen artifacts in interstate commerce. Pet. App. 3a; Gov't C.A. Br. 2-3.

4. The court of appeals affirmed petitioner's conviction, rejecting his claim that 16 U.S.C. 470ee(c) applies only to archaeological materials removed from federal

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Section 470ee(d) sets the penalties for violation of any of the other subsections of Section 470ee. Prior to November 3, 1988, a felony violation occurred when the commercial value of the archaeological resources was greater than $5,000; the 1988 amendments to the ARPA reduced that amount to $500. See Act of Nov. 3, 1988, Pub. L. No. 100-588, § 1(c), 102 Stat. 2983.

[4] Petitioner's ARPA violations were based upon violations of Indiana's criminal trespass and conversion laws. Under Indiana law, a person commits criminal trespass when he "[k]nowingly or intentionally interferes with the possession or use of the property of another person without the person's consent." Indiana Code § 35-43-2-2(4) (1992). A person who "knowingly or intentionally exerts unauthorized control over property of another person" commits criminal conversion. Indiana Code § 35-43-4-3 (1992).

and Indian lands, and not to those removed from private property. The court held that Section 470ee(c) is a "catch-all" provision designed to back up state and local laws protecting archaeological sites and objects wherever located, and that the interstate commerce requirement would be superfluous if that provision were limited to artifacts taken from federal or Indian lands. Pet. App. 5a-6a. The court also rejected petitioner's contention that the state or local law violated must be explicitly concerned with the protection of archaeological sites or objects. While the court agreed that the ARPA applies only to cases in which the state law violation is "related" to the protection of archaeological sites and objects, it held that such a law need not be limited to the protection of archaeological resources to be "related." Thus, the court found, violation of Indiana's laws forbidding trespass and conversion fell within the conduct prohibited by the ARPA. Pet. App. 7a-8a.

ARGUMENT

Although petitioner disputes the correctness of the court of appeals' decision, he does not contend that the ruling conflicts with the decision of any other state or federal court. To the contrary, petitioner characterizes the questions presented for this Court's review as "issues of first impression." Pet. 5. Given the absence of any split in authority, further review is not warranted.

1. Section 470ee(c) of Title 16 prohibits the sale, purchase, and transportation in interstate commerce of any archaeological resource that has been "excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." Petitioner contends (Pet. 8-10) that Section 470ee(c) applies only to violations of state archaeological resources

protection laws. Nothing in the language of the statute supports such a restriction, and the court of appeals correctly rejected petitioner's argument. Petitioner relies upon the purported floor statement of Senator Domenici, the ARPA's Senate sponsor, see Pet. 9; but that statement offers no support for petitioner's proposed limitation. Senator Domenici merely caused to be printed in the Congressional Record a newspaper editorial which asserted that the ARPA "would dovetail with existing state laws" so that offenders could not avoid prosecution by fleeing to another State. 125 Cong. Rec. 21,241 (1979). That statement—even if it could properly be attributed to Senator Domenici—could provide no support for petitioner's claim that the language of Section 470ee(c) should be read as limited to violations of state archaeological protection laws.

In any event, it is the language Congress actually enacted, and not Congress's discussion of its intent, that defines the scope of the statute's coverage. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495-496 n.13 (1985) (what Congress thinks is "best determined by the statutory language that it chooses"); see also *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991) ("legislative purpose is expressed by the ordinary meaning of the words used"). Nor is there merit to petitioner's suggestion (Pet. 9) that the absence of affirmative references to state laws other than resource protection laws weighs against the court of appeals' interpretation. See *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."); see

also *Sedima*, 473 U.S. at 495-496 n.13 ("congressional silence * * * cannot override the words of the statute").[5]

The court of appeals ruled that the state or local law violations must be "related" to the protection of archaeological resources in order to fall within the scope of Section 470ee(c). The court reasoned that a broader interpretation of the requisite state or local law violation—one that included *any* state or local law, regardless of subject—"would carry the Act far beyond the objectives of its framers and create pitfalls for the unwary." Pet. App. 8a. Petitioner argues (Pet. 8-10) that the court of appeals thereby established an unworkable standard. That contention provides no basis for this Court's review.

Indiana's laws forbidding trespass and conversion protect the owners of property from unauthorized intrusions, theft, and interference with their property. As the

[5] In support of his contention that the underlying state or local laws can only be antiquities laws, petitioner also cites (Pet. 9) a publication issued by the United States Department of Agriculture Forest Service. See Robert B. Collins, *The Meaning Behind ARPA: How the Act is Meant to Work* at 5, in Cultural Resources Report No. 32 (USDA Forest Service, Southwestern Region) (July 1980). That publication hardly provides unambiguous support for petitioner's position. Although it states that Section 470ee(c) "enlists Federal assistance in enforcing state and local antiquities laws" and "is designed to prevent one from violating a state antiquities law and fleeing across a state line," it does not directly address the question whether violations of other state and local laws may form the predicate for application of Section 470ee(c). In any event, an agency's interpretation of the law may be used only to clarify statutory ambiguities, see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-448 (1987); moreover, the Department of Agriculture is not the agency charged with implementation of the ARPA's criminal provisions. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment).

court of appeals noted, these laws thus clearly have objectives that "include but are not exhausted in the protection of Indian artifacts and other antiquities," and thus are "related" to the protection of archaeological resources.[6] Pet. App. 8a. Whatever the merits of the Seventh Circuit's approach as applied in other circumstances, the facts of petitioner's case do not support his contention that the court of appeals' standard is vague and unworkable. Nor do the facts suggest that the statute has functioned as a trap for the unwary: as the court of appeals noted, "there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them." Pet. App. 6a.

2. Petitioner also renews his claim (Pet. 10-16) that Section 470ee(c) applies only to public and Indian lands, as defined in 16 U.S.C. 470bb(3) and (4), and not to private property. That claim is without merit.

The court of appeals properly found that Section 470ee(c) is a "catch-all" provision designed to back up state and local laws protecting archaeological sites and objects wherever located. Pet. App. 5a-6a. Unlike the other provisions of the ARPA, which expressly limit the archaeological resources protected to those located on or removed from public or Indian lands, Section 470ee(c) establishes federal jurisdiction over state offenses through the requirement that the transportation, sale, purchase, or receipt of the archaeological resources be in interstate or foreign commerce. As the court of appeals pointed out, the reference to interstate commerce would

[6] As the court of appeals pointed out, the reach of Indiana's criminal trespass and conversion laws may well have led the State at the time to assume that it needed no further explicit protection of archaeological resources. Pet. App. 8a-9a.

be "superfluous" if Section 470ee(c) were limited to artifacts taken from federal or Indian lands only, since the source alone would establish the requisite federal jurisdiction. Pet. App. 6a. Nothing in the language of the statute supports that limitation on the archaeological resources sought to be protected.

Petitioner contends (Pet. 11-16) that the omission of a reference to public and Indian lands in Section 470ee(c) was unintentional, and that the court of appeals erred in adopting its broad interpretation, because doubt as to whether the statute applies to private lands should be resolved in his favor. The language of Section 470ee(c), however, does not include any reference to public and Indian lands, and thus there is no room for doubt as to its coverage. See *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979) (the "short answer is that Congress did not write the statute that way"). Where the statutory language is plain, the judicial inquiry is complete. *Freytag* v. *C.I.R.*, 111 S. Ct. 2631, 2636 (1991). The rule of lenity thus has no place in the consideration of the scope of Section 470ee(c), because that rule applies only when a statute is ambiguous.[7] See *Deal* v. *United States*, 113 S. Ct. 1993, 1998 (1993); *Bifulco* v. *United States*, 447 U.S.

[7] Petitioner also contends (Pet. 11-13) that the legislative history and congressional findings demonstrate congressional intent to limit the ARPA to public and Indian lands. As the court of appeals correctly noted, "[t]hat the statute, the scholarly commentary, and the legislative history are all focused on federal and Indian lands may simply reflect the fact that the vast majority of Indian sites * * * are located either in Indian reservations or on the vast federal public lands of the West." Pet. App. 5a. In any event, as discussed previously, the language that Congress enacted determines the scope of the statute. Although the prohibitions set forth in Sections 470ee(a) and 470ee(b) are expressly limited to public and Indian lands, Section 470ee(c) contains no such restriction.

381, 387 (1980) ("the 'touchstone' of the rule of lenity 'is statutory ambiguity' "). The court of appeals correctly found that Section 470ee(c) restricts the prohibited trafficking in archaeological resources only to trafficking in interstate or foreign commerce.[8]

3. Finally, petitioner claims (Pet. 16-17) that Section 470ee(c) is unconstitutionally vague. The court of appeals correctly rejected that argument. Petitioner cannot reasonably contend that he did not have sufficient notice that his invasion of private property was illegal. There also is no doubt that the clear language of Section 470ee(c) adequately informed him that transporting in interstate commerce the Indian artifacts he and his co-defendants knowingly took from GE's property was a violation of that statute. Cf. *United States* v. *Austin*, 902 F.2d 743 (9th Cir.) (rejecting vagueness challenge to 16 U.S.C. 470ee(a) because statute provides fair notice to defendant), cert. denied, 498 U.S. 874 (1990). Nor can petitioner prevail by asserting that the court of appeals' standard may prove vague as applied in other circumstances. The law as applied to petitioner is not vague,

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[8] Petitioner also argues that in 1980 "it was the official position of the USDA Forest Service * * * that ARPA did not extend to private property." Pet. 13 (citing *Cultural Resources Law Enforcement: An Emerging Science* (USDA Forest Service, Southwestern Region), at 1, 101 (1980)). Petitioner fails to note that a different Forest Service publication—also issued in 1980, and relied upon by petitioner for a different proposition—took a contrary view. See Collins, *supra*, at 5 ("one would be prohibitied [*sic*] in the new Act from traveling from Arizona to New Mexico to bulldoze a site on private land without a permit"). These publications may reveal initial uncertainty by the Forest Service regarding the scope of Section 470ee(c)'s application, but they do not establish an official departmental policy at odds with the holding of the court of appeals.

and he therefore cannot challenge the law's possible vagueness as applied to other defendants under other circumstances. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993